

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2003-164**

ISSUE: May an attorney-client relationship be formed with an attorney who answers specific legal questions posed by persons with whom the attorney has not previously established an attorney-client relationship on a radio call-in show or other similar format?

DIGEST: The context of a radio call-in show or other similar format is unlikely to support a reasonable belief by the caller that the attorney fielding questions is agreeing implicitly to act as the caller's attorney or to assume any of the duties that flow from an attorney-client relationship.

AUTHORITIES

INTERPRETED: Rules 3-110, 3-300 and 3-310 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code section 6068, subdivision (e).

Evidence Code sections 951, 952.

STATEMENT OF FACTS

As part of an effort to recognize Law Day, a local radio station invites an attorney (Attorney) to answer legal questions posed by the station's listeners. Attorney agrees to appear without compensation to answer questions "live and on the air." During the special radio talk show commemorating Law Day, listeners ask questions involving a variety of legal topics. Several times during the radio program it is announced on the air that all calls are being screened by the radio station's staff, that callers should not expect their conversations with Attorney or the radio staff to be held in confidence, and that the legal information provided "on the air" is not intended to be a substitute for callers hiring their own lawyers to advise them about personal legal matters. Callers do not provide their full names on the air. They are pre-screened by the radio station's non-attorney staff, in part to identify and showcase matters of general interest to the listening audience. The screeners also announce to each caller that she or he should not expect confidentiality in the discussion with Attorney. Despite the screener's confidentiality disclaimer and the periodic announcements during the course of the program, specific information about the caller's identity and legal issue is sometimes disclosed to the screener.

During the show, a caller poses a question involving a landlord-tenant matter. Relying on law school training and information garnered over the years, Attorney provides the caller with a generalized answer rather than one directly addressing the caller's specific question. Following the answer, Attorney points out that the question is outside his area of expertise, and that the caller should select and consult an attorney who practices in the field of landlord-tenant law.

In response to another caller's question about a probate matter, Attorney again provides a generalized answer. The answer provided, however, is incorrect and misstates the law. However, Attorney again cautions the caller that the question is outside his area of legal expertise and suggests that the caller select and consult with an attorney who practices in the area of probate law.

In both situations, Attorney answers questions from callers with whom he has not previously established an attorney-client relationship. In the following discussion, we consider some of the implications and potential professional responsibility issues involved in the aforementioned situations.

DISCUSSION

I. Background

The courts and the legal profession have acknowledged that, despite the number of practicing attorneys, a large segment of the population lacks access to competent, affordable legal services. Notwithstanding efforts of legal services organizations and individual attorneys that provide *pro bono* representation to thousands of individuals, this problem persists. Partly in response to the need for increased access to competent legal counsel, a number of methods have emerged for providing specific legal information to greater numbers of people about their legal rights and responsibilities. For example, it is now common for attorneys to answer legal questions through radio call-in programs, newspaper and magazine columns, and other similar formats.^{1/}

While the questions posed in such formats sometimes request information about general, abstract principles of law, the inquirers often disclose specific facts and request specific responses. The Committee has been asked, by reference to the factual setting presented above, to provide an opinion about the potential for forming an attorney-client relationship or assuming any of the professional duties owed a client when a lawyer participates in answering questions through some form of public media.

II. Formation of an attorney-client relationship

In the present situation, although the callers may be speaking to Attorney for the purpose of securing legal advice about a specific legal problem, they are doing so as part of a call-in radio program. As discussed below, the Committee believes that context does not provide a basis for a caller to form a reasonable belief that an attorney-client relationship has been formed, expressly or implicitly, with Attorney. In particular, the callers cannot have any reasonable expectation that Attorney will keep confidential information that the callers have chosen to transmit in a public forum and advice or information which the callers have elected to receive through that same public forum.

An attorney-client relationship can be created by express or implied agreement. Except when created by court appointment, the attorney-client relationship may be found to exist based on the intent and conduct of the parties and the reasonable expectations of the potential client. (See, e.g., *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 281, fn. 1 [36 Cal.Rptr.2d 537] [discussing the factual nature of determining whether an attorney-client relationship has been formed]; *Hecht v. Superior Court* (1987) 192 Cal.App.3d 560, 565 [237 Cal.Rptr. 528] [the determination that an attorney-client relationship exists ultimately is based on the objective evidence of the parties' conduct]; *Fox v. Pollack* (1986) 181 Cal.App.3d 954 [226 Cal.Rptr. 532] [absent some objective evidence of an agreement to represent plaintiffs, it is not sufficient that plaintiffs "thought" defendant was their attorney].)

On the facts presented to us, Attorney has not agreed explicitly to form an attorney-client relationship with the callers. Hence, any attorney-client relationship would have to be implied from the circumstances. This question is of vital importance to Attorney because if Attorney were to form an implied-in-fact attorney-client relationship with a caller, then Attorney would be obligated to comply with all of the professional responsibilities owed to a client. Among the responsibilities ordinarily owed a client are confidentiality, loyalty, and competency.^{2/} The fact that the attorney does

^{1/} There are many other situations in which attorneys provide information on legal topics to the public including, for example, articles and texts directed to non-lawyer audiences and public commentary on legal issues. These activities are beyond the scope of this opinion, which focuses on an attorney's responses to questions posed to the attorney in a public forum.

^{2/} (See Business and Professions Code section 6068, subdivision (e); Rules 3-110, 3-300 and 3-310 of the Rules of Professional Conduct of the State Bar of California.)

not charge a fee or receive consideration for services provided does not relieve an attorney of his or her professional responsibilities if the totality of the circumstances indicates an attorney-client relationship has been formed.^{3/}

In California State Bar Formal Opn. No. 2003-161 at pages 3-4, we noted that the courts have looked to a number of factors in assessing whether the totality of circumstances warrants concluding that an attorney-client relationship has been formed absent express agreement of the attorney and client. Those factors include:

- Whether the attorney volunteered his or her services to a prospective client. (*Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 39 [154 Cal.Rptr. 22]);
- Whether the attorney agreed to investigate a case and provide legal advice to a prospective client about the possible merits of the case. (*Miller v. Metzinger* (1979) 91 Cal.App.3d 31 [154 Cal.Rptr. 22]);
- Whether the attorney previously represented the individual, particularly where the representation occurred over a lengthy period of time or in several matters, or occurred without an express agreement or otherwise in circumstances similar to those of the matter in question. (Cf. *IBM Corp. v. Levin* (3d Cir. 1978) 579 F.2d 271, 281 [law firm that had provided labor law advice to corporation for several years held to be in an ongoing attorney-client relationship with corporation for purposes of disqualification motion, even though firm provided legal services on a fee for services basis rather than under a retainer arrangement and was not representing the corporation at the time of the motion].);
- Whether the individual sought legal advice from the attorney in the matter in question and the attorney provided advice. (See *Beery v. State Bar* (1987) 43 Cal.3d 802, 811 [239 Cal.Rptr. 121]);
- Whether the individual paid fees or other consideration to the attorney in connection with the matter in question. (See *Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1403 [82 Cal.Rptr.2d 326]; *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959 [226 Cal.Rptr. 532]);
- Whether the individual consulted the attorney in confidence. (See *In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556 [20 Cal.Rptr.2d 132];
- Whether the individual reasonably believes that he or she is consulting a lawyer in a professional capacity. (See *Westinghouse Electric Corp. v. Kerr-McGee Corp.* (7th Cir. 1978) 580 F.2d 1311, 1319).

Again, the inquiry is based on the totality of the circumstances. No single factor is necessarily dispositive.^{4/}

^{3/} An attorney's failure to provide agreed-upon services to a *pro bono* client supported the imposition of discipline. (*Segal v. State Bar* (1988) 44 Cal.3d 1077 [245 Cal.Rptr. 404].)

^{4/} Further, in evaluating whether an attorney may have assumed any of the duties, including confidentiality, that an attorney ordinarily owes a client, courts look at the context in which the consultation between the attorney and the person seeking legal advice took place. For example, in considering whether a person's communications with an attorney should subject the attorney to disqualification, the Supreme Court has held that the primary concern is whether and to what extent the attorney acquired material confidential information. *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816]. The Court in *Speedee Oil* discussed *In re Marriage of Zimmerman*, *supra*, 16 Cal.App.4th 556. *Zimmerman* had involved a person's communications to a lawyer in the context of a preliminary consultation. The *Speedee Oil* court pointed out that the party seeking disqualification in *Zimmerman* (the wife) failed to show that attorney Gack [the partner of the husband's lawyer] had acquired confidential information during the preliminary consultation with the wife. The court noted that if Gack [the partner of the husband's

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Here, one can point to some of the facts in our hypothetical to support concluding that the Attorney could be forming attorney-client relationships with callers to the radio show by having invited them to ask questions calling for legal knowledge and judgment and by agreeing to provide answers to them. For example, (1) the callers are provided with an opportunity to pose “legal questions” to Attorney; (2) the callers take advantage of that opportunity by calling in to the radio program and, in some cases, give specific information about their identity and legal problems to the screener, despite the requests not to do so; (3) the callers go on the air and present personal legal problems to Attorney; (4) Attorney answers the questions posed. Legal advice has been defined as that which “require[s] the exercise of legal judgment beyond the knowledge and capacity of the lay person.” (*In re Anderson* (Bankr.S.D.Cal. 1987) 79 B.R. 482, 485.) Cases suggest that legal advice includes making a recommendation about a specific course of action to follow.^{5/} In addition, courts ask whether the attorney may have volunteered his or her services to the purported client. (*Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 39 [154 Cal.Rptr. 22]).

On the other hand, the following facts from the hypothetical weigh against the formation of an attorney-client relationship: (1) It is not reasonable for a person to believe that participating in a radio program by posing questions to someone identified as an attorney is an acceptable manner of seeking legal advice, in contrast to the normal methods of engaging an attorney (such as phoning the attorney’s office or visiting the attorney in his or her office for a consultation); (2) the public nature of the broadcast makes it impossible for the caller to have any reasonable expectation of confidentiality, which is ordinarily an essential element of an implied-in-fact attorney-client relationship; (3) periodically during the course of the program there are announcements that callers cannot expect any confidentiality; (4) the screener tells each caller, prior to receiving any facts about the caller, that the caller should not expect any confidentiality or privacy in conversing on the air with Attorney; (5) periodic on-the-air announcements state that the radio program is “not intended to be a substitute for callers hiring their own lawyers” for legal advice regarding their specific problem; (6) consistent with the periodic announcements, and the time limitations imposed by the radio call-in format, Attorney provides answers that are fairly generalized and designed to maximize the educational value of the caller’s question as a tool for providing general legal information to the radio audience as a whole; (7) the callers are repeatedly told they should seek out a more knowledgeable attorney to advise them on particular matters, conveying Attorney’s intent not to represent the callers; and (8) the callers are not charged and Attorney is not paid a legal fee.^{6/}

On balance, there is no reasonable basis for callers to believe Attorney is undertaking to represent the caller’s specific interests. (Please see California State Bar Formal Opn. No. 2003-161, *supra*, for a complete discussion of the foregoing factors that are considered in determining whether an implied attorney-client relationship has been formed. We do not

^{4/} (...continued)

lawyer] provided any representation at all, “it was clearly work of a preliminary and peripheral nature. [Citation.] . . . He performed no work for [wife, instead referring] her to an attorney with ‘domestic expertise.’” *Id.* at 564 - 65, 20 Cal.Rptr.2d at 137-38. Because of the partner’s minimal involvement in the wife’s case, the court determined “he obviously was not called upon to formulate a legal strategy and . . . could not have gained detailed knowledge of the pertinent facts and legal principles.” *Id.* at 564, 20 Cal.Rptr.2d at 137. On that basis, the court noted the *Zimmerman* court properly refused to disqualify the husband’s lawyer.

^{5/} For example, determining when a debtor should file a bankruptcy petition was deemed to be “legal advice.” (*In re Gabrielson* (Bankr.D.Ariz. 1998) 217 B.R. 819, 824.) See also, *In re Glad* (Bankr.9th Cir. 1989) 98 B.R. 976, 978 [advising a debtor to file a chapter 11 bankruptcy petition]; and *In re Kaitangian* (Bankr.S.D.Cal. 1998) 218 B.R. 102, 112 [explaining or discussing the impact of a bankruptcy filing on the dischargeability of debts].

^{6/} One factor bearing on the formation of an attorney-client relationship is the payment of legal fees. (*Strasbourg Pearson Tulcin Wolff, Inc. v. Wiz Technology, Inc.* (1999) 69 Cal App 4th 1399, 1403 [82 Cal.Rptr.2d 326]; *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959 [226 Cal.Rptr. 532, 535].) Thus, if Attorney received compensation to provide such advice, the payment might constitute an additional, although not necessarily a conclusive factor to consider in determining whether an attorney-client relationship had been formed with the caller. Similarly, the nonpayment of fees or the absence of a written fee agreement would not necessarily require a conclusion that an attorney-client relationship was *not* formed.

intend our more concise application of the same principles in this opinion to alter the more exhaustive analysis set forth in California State Bar Formal Opn. No. 2003-161.)

As already noted at the beginning of this Discussion, it is not reasonable for a person to believe that discussing legal issues with an attorney creates an attorney-client relationship if others are present, if they are able to hear the entire discussion, and if they are not present to further the interests of the person in the discussion (see Evid. Code, § 952). We emphasize, however, that the issue as to the existence of an implied-in-fact attorney-client relationship is one of fact, resolved on the basis of the totality of the circumstances and from the standpoint of the reasonable expectations of the person dealing with the attorney.^{7/} An attorney can avoid the inadvertent creation of an attorney-client relationship by words, conduct, or other explicit action. (*People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456] [attorney told defendant that he could not represent the defendant in advance of discussion of defendant's legal problem]; see also *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959 [226 Cal.Rptr. 532, 535].)^{8/}

Although we conclude there is no reasonable basis for a caller to believe that an attorney-client relationship is formed through the call-in show, it is important that Attorney keep in mind the limitations of the call-in format and the Attorney's own expertise. Because the purpose of the call-in show is to provide legal information to the public at large, thus improving the accessibility of the law to the public, it serves little purpose for Attorney, as he has done here, to disseminate information about which he cannot be confident. Attorneys who answer questions on a radio call-in show or other similar format should avoid answering questions about areas of law with which they are unfamiliar.

^{7/} In this regard, attorneys need to be sensitive to the possibility that someone might believe that an attorney-client relationship has been formed with the attorney, even if that belief is mistaken. In *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 [228 Cal.Rptr. 499], the California Supreme Court disciplined an attorney for, among other things, the attorney's failure to communicate with the stepson of the attorney's purported client where, under the facts, the stepson reasonably believed he was a client of attorney. The court noted that at a minimum, the attorney had a duty to advise the stepson he was not a client.

^{8/} Even when an individual engages in an initial consultation with an attorney, but no attorney-client relationship is formed, the attorney can nonetheless take on a duty to keep confidential the information divulged during the consultation. Evidence Code section 951 broadly defines "client" for purposes of the attorney-client privilege as "a person or entity who, directly or through an authorized representative, consults a lawyer for the purposes of retaining the lawyer or securing legal service or advice from him in his professional capacity." Evidence Code section 952 defines "confidential communication between client and lawyer" to mean: "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, *discloses the information to no third persons other than those who are present to further the interest of the client in the consultation . . .*" (Emphasis added.) Thus, an attorney might owe a duty of confidentiality to a person consulting the attorney for purposes of securing legal services or advice if, by words or conduct, the attorney manifests a willingness to engage in a preliminary consultation for the purpose of providing legal advice or services, and confidential information was communicated to Lawyer. (Cf. *Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 39-40 [154 Cal.Rptr. 22], quoting *Westinghouse Elec. Corp. v. Kerr-McGee Corp.* (7th Cir. 1978) 580 F.2d 1311, 1319 ("[T]he fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result.") See also California State Bar Formal Opn. No. 2003-161 for a comprehensive consideration of this issue.)

Under the specific facts presented here, however, even if a caller called in for the purpose of securing legal advice about a specific legal problem, the radio program's format could not create a reasonable expectation that the caller is engaging in a confidential consultation with Attorney because the callers are told that their communications to Attorney and Attorney's responses are all broadcast to the public. In our opinion it is not reasonable to believe that the discussion of legal issues with an attorney has imposed on the attorney a duty of confidentiality if others are present, if they are able to hear the entire discussion, *and* if they are not present to further the interests of the potential client in the discussion (see Evid. Code, §§ 951, 952).

CONCLUSION

Both attorneys and the public benefit from the dissemination of information about legal rights and responsibilities, which contributes to greater access to the justice system. Attorneys providing that service to the public should, however, keep in mind the limitations of the format they use, especially when providing information about complex topics and topics outside an attorney's area of legal expertise.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its board of governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.